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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 49 107

UNITED STATES COLD STORAGE CORPORATION, PETITIONER
(Respondent Below)

VERSUS

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
(Petitioner Below)

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF

H. BASCOM THOMAS, JR.
1313 Southwestern Life Building
Dallas, Texas
Counsel for the Petitioner

HUBARD T. BOWYER
Of Counsel

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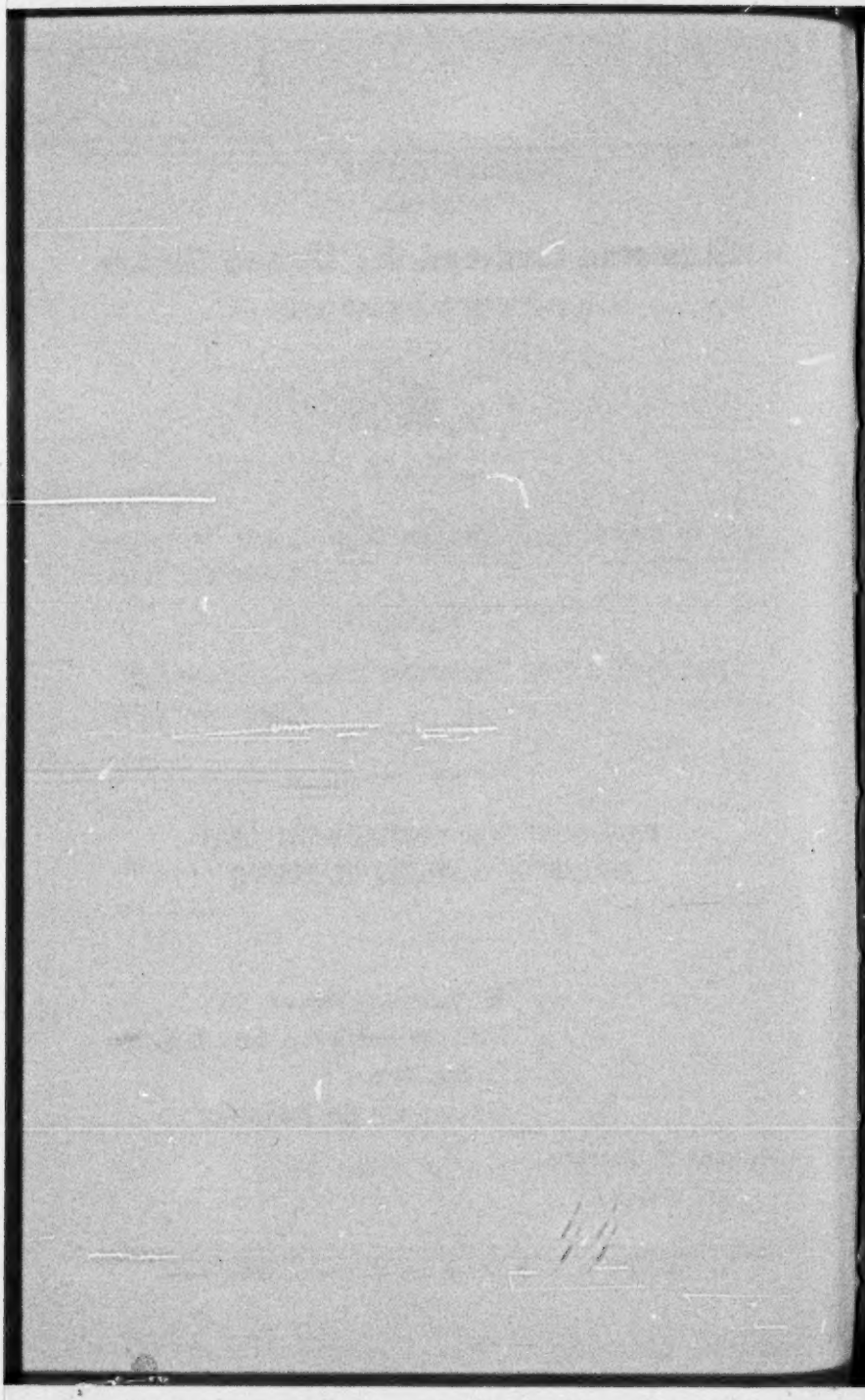

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully shows to this Honorable Court as follows:

SUMMARY OF THE MATTER INVOLVED

This case arose on a petition of the Respondent, National Labor Relations Board (Petitioner below) filed in the United States Court of Appeals for the Fifth Circuit against the United States Cold Storage Corporation to enforce an order of the Board entered on October 29, 1951. The findings of fact, conclusions of law and order of the Board are set out at pages 77-92 of the Record.

The Court of Appeals by a divided court on April 23, 1953, rendered a decision enforcing the order as prayed for in the Board's petition. The decision of the Court of Appeals is reported —— F. 2d ——. (Record p. 123).

On May 19, 1953, the Petitioner herein filed an application for stay of enforcement of judgment in the Court of Appeals pending the filing of a petition to the United States Supreme Court for a writ of certiorari (Record p. 143). The Court of Appeals stayed the enforcement of the judgment for a period of thirty (30) days from May 19, 1953, pending the filing by the Petitioner of its petition for certiorari in the Supreme Court of the United States (Record p. 146).

The Petitioner, United States Cold Storage Corporation, herein called the "Company", maintains and operates a cold storage plant in Dallas, Texas, in which it stores perishable foods of all kinds. It employes an average of 65 employees at all times and of this number the 7 employees in the Engineering Department are the only ones

involved in this proceeding. On December 14, 1949, following an election held in the previous month among the employees of the Engineering Department, the Stationary Engineers, Local 707, International Union of Operating Engineers, A.F.L., herein called the "Union", was designated by the Board as the bargaining agent of the employees in the Petitioner's Engineering Department at Dallas.

During the period January 9, 1950, to April 3, 1950, Petitioner and the Union engaged in bargaining negotiations, and after 16 different meetings were held, an agreement was substantially reached on everything except wages and seniority. On April 5, 1950, the Union called a strike and established a picket line at the plant from that date until June 23, 1950, when the Union withdrew the pickets.

On April 6, 1950, the Company sent a telegram to each of the striking employees reading as follows: "We consider the strike illegal since at no time did the Company refuse to bargain. Under the circumstances we would like you to report back to your regular job within 24 hours after receiving this telegram on your regular shift time. If you do not report, we will consider that you are terminating your employment and a replacement will be hired." (Page 99, Appendix to Petitioner's Brief, Respondent below).

The striking employees did not return and 4 replacements were hired before April 24, 1950. (Record p. 114).

On April 24, 1950, the Company sent a letter to each one of the striking employees regarding his insurance under a group insurance policy and gave each of them the right to get individual policies with the Travelers Insurance Company which was carrying the group insurance. (Page 99, Appendix to Petitioner's Brief, Respondent Below).

On May 1, 1950, the Union by letter informed the Company that it had filed charges with the National Labor Relations Board and protested the telegram of April 6 and the letter of April 24 in behalf of the employees and demanded that they be returned to employee status. The Company on May 8, 1950, answered the Union's letter disclaiming any discrimination, outlining its position on the telegram and the matter of group insurance; that the Company had secured replacements for some of the striking employees and offered to reinstate three striking employees and that the others could make application for reemployment and would be employed when vacancies occurred. The Union was informed that if it desired to continue negotiations if it would submit any proposition it had to make in writing, it would be considered by the Company.

On May 13,1950, two of the striking employees returned to work. None of the others have made application at any time to return. (Pages 63-64, Appendix to Petitioner's Brief, Respondent Below).

In a letter of May 20 received by the Company on May 22, the Union sent a form of contract for the Company's consideration, which contract contained the same matters which had been thoroughly discussed with the Union prior to the strike and in which the Union had made no consession on the question of wages and seniority that had not been previously discussed. (Record p. 119).

Between the dates of May 26 and June 20, 1950, there was in interchange of correspondence between the Union and the Company concerning the Union's proposed contract of May 20 (pp. 125-133, Appendix to Petitioner's Brief, Respondent Below).

From the date of June 20, 1950, up to the time of the hearing, the Company heard nothing from the Union or from any of the men who were on strike. The Company secured replacements for the striking employees.

The other employees of the Company who were not involved in the controversy did not go out on strike and the plant continued to operate.

A hearing was held by the Trial Examiner upon a complaint filed by the Union with the National Labor Relations Board.

The Trial Examiner found in substance that:

(a) The Company did not refuse to bargain collectively with the Union.

(b) The strike of April 5, 1950, was an economic strike and not the result of unfair labor practices.

(c) The Company did not engage in unfair labor practices by sending the telegram dated April 6, 1950, and the letter of April 24, 1950, to each of the striking employees. (Record pp. 93-121).

The Trial Examiner made other findings which are not now material to the issue herein.

The Trial Examiner recommended that the complaint be dismissed in its entirety. Upon exceptions filed, the case was transferred to the National Labor Relations Board.

The Board by its decision and order dated April 29, 1951, held in substance:

(1) That the Company bargained in good faith prior to the strike.

(2) That the Company by refusing to meet with the Union during the strike violated Section 8(a)(5) of the Act.

(3) That the strike was economic in its inception.

(4) That the discharge of the striking employees by the telegram of April 6 constituted interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act.

(5) Entered a case and desist order against the Company.

(6) Order the striking employees reinstated with back pay.

(7) Ordered the Company to bargain collectively with the Union. (Record pp. 77-92).

The majority of the Court of Appeals held in substance:

(1) That although the Company had the right to hire replacements for the strikers at any time prior to their unconditional request for reinstatement that it was an unfair labor practice to discharge the economic strikers prior to the time their jobs were filled basing its decision on the telegram of April 6 and the letter of April 24.

(2) That although an impasse had been reached in the bargaining negotiations prior to the strike that refusal to meet with the Union in person during the strike was an unfair labor practice.

The majority of the Court decreed enforcement of the Board's order.

Hutcheson, Chief Judge, filed a dissenting opinion in which he pointed out the errors of the Board and the majority of the Court in these particulars:

(1) In holding that the Company committed an unfair labor practice in notifying its striking employees that it would like for them to return to their regular jobs and

that if they did not return within the time named the Company would consider that they were terminating their employment and that a replacement would be hired.

(2) In failing to give the proper effect to the Company's letter of May 8 in which, disclaiming any intention to discriminate against the strikers, the Company assured the Union that while it had secured replacements for some of the men, it could at the present time employ three and the others could make application when vacancies occurred.

(3) In holding that the suggestion of the Company after sixteen sessions of oral negotiations had resulted in an impasse that written proposals be exchanged was a refusal to bargain.

(4) That two strikers having been reinstated and the Company having offered reinstatement to the others as vacancies occurred and the others not having requested reinstatement, it was error for the Board to order their reinstatement with back pay.

It is to review the action of the majority of the Court of Appeals that this certiorari is sought.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to review the judgment here in question under Rule 38 Section 5(b) and Title 28, United States Code, Section 1254, and Title 29, United States Code, Section 160(e) for the following reasons:

(a) The majority of the Court of Appeals has rendered a decision in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *Kansas Milling Company vs. National Labor Relations Board*, 185 F. 2d 413, in a situation almost identical with that presented here.

(b) The majority of the Court has construed the National Labor Relations Act as permitting the Board to base its decision on an assumption rather than from substantial evidence of the record considered as a whole. In so doing, the majority of the Court:

(i) Has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure by the National Labor Relations Board as to call for an exercise of this Court's power of supervision.

(ii) Has decided an important question of Federal law which has not been but should be settled by this Court.

QUESTIONS PRESENTED

(1) Whether the Board and a majority of the Court in basing their decision upon an assumption that the strike broke the impasse existing in the negotiations prior thereto properly held that the Company had violated Section 8(a)(5) of the Act in requesting the Union to submit its proposals in writing during the strike.

(2) Whether in light of the substantial evidence and particularly the Company's letter of May 8, the Board and a majority of the Court properly held that the striking employees had in fact been discharged and that the Company had violated Section 8(a)(1) of the Act in this particular.

(3) Whether the striking employees should be reinstated with back pay, since none except those actually reinstated have ever applied for reemployment.

THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The decision of the majority of the Court of Appeals conflicts with the decision of the Court of Appeals for the Ninth Circuit in the case of *Kansas Milling Company vs. National Labor Relations Board*, 185 F. 2d 413, since in that case the strike was of economic inception and the employer during the strike wrote to the striking employees:

> (a) "If you do not return, the Company has no other alternative than to hire new employees to take the jobs which you have vacated. We trust this will not be necessary."
>
> (b) "Under the terms of the group insurance policy in which you were participating, you are no longer covered."

(c) "Since you have terminated your employment with this Company, if you have any clothes or other personal belongings at the plant, we would like for you to call for them by September 16, 1947."

The Court of Appeals, Ninth Circuit, held the foregoing letters did not constitute unfair labor practices within the meaning of the Act. The majority of the Court in the instant case held that similar letters did violate the Act. This conflict in decision should be settled by this Court.

(2) The majority of the Court have sanctioned a finding by the National Labor Relations Board based on an assumption in their finding and decision as follows:

> "Its (the Board's) decision was based on the assumption that the impasse which existed before the strike was broken by the strike and by the change in circumstances that developed subsequent thereto."

Whereas, the Labor Management Relations Act as amended requires that the Board's findings be based upon substantial evidence of the record considered as a whole.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of said Court had in the case numbered and entitled on its docket, No. 14,035, National Labor Relations Board, Petitioner, vs. United States Cold Storage Cor-

poration, Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment herein of said United States Court of Appeals for the Fifth Circuit be reversed by this Court and that the petition for the enforcement of the order of the National Labor Relations Board be in all things denied, and for such further relief as to this Court may seem proper.

UNITED STATES COLD STORAGE CORPORATION

By.....

.....

COUNSEL FOR PETITIONER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.———

UNITED STATES COLD STORAGE CORPORATION, *Petitioner*

versus

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION OF THE COURT BELOW

Opinion of the Court of Appeals for the Fifth Circuit is set out in the Record at page 123 and is reported in —— F. 2d ——. The dissenting opinion, Record p. 132.

JURISDICTION

A complete statement of the basis and reason for exercising jurisdiction by this Court is given in the petition

for certiorari. In the interest of brevity, it is omitted here.

STATEMENT OF THE CASE

In addition to the statement in the petition for certiorari which is here adopted, the material parts of the letters of May 8 and June 19 are set out as follows:

Petitioner's letter to the Union of May 8:

> On April 6, 1950, we gave each of these men an unconditional offer to return to their jobs. They refused to do so but continued to strike and picket our premises. There has been no discrimination against these men mentioned in your letter on account of any union activity. They have not been locked out; they voluntarily left their jobs.
>
> The Company has a group insurance policy with the Travelers Insurance Company covering such employees who might elect to participate in this plan. This plan provides that the employee should contribute a portion of the premium out of his wages each week. The men you mentioned in your letter who had been participating in the group insurance walked out of the premises on April 5, 1950, and since that date have not contributed any part of the premium on the insurance. There was no obligation on the part of the Company to maintain this insurance solely at its own expense, and since they voluntarily left their employment we had no recourse other than to notify the Insurance Company and give these men an opportunity to convert the insurance, as provided by the agreement with the Insurance Company when an employee terminates his employment.

Since these men walked out voluntarily and picketed our premises, and refused to return to work when we made them an unconditional offer to do so, we have secured replacements for some of these men. At the present time we can re-employ one operating engineer and two maintenance men-trainees. We are willing to re-employ the operating engineer on a seniority basis. Re-employment of maintenance men-trainees will be on the basis of ability and likelihood of subsequently meriting promotion to operating engineer.

The other former employees may make application for employment and will be re-employed when vacancies occur. If you desire to continue negotiations, if you will submit any proposition you have to make in writing, it will be considered by the Company at any time.

Petitioner's letter to the Union of June 19:

After receiving your letter of June 2 I have given further consideration to the contract which was submitted in your letter of May 20. After an examination of this contract and the one submitted to you in our letter of March 27, we find that the only substantial differences are the matters of seniority and wages.

The provisions of the contract with reference to seniority were thoroughly discussed with you and Mr. Pollard prior to that time. We wrote up the contract submitted to you on March 27 and understood that you had agreed to these provisions.

The schedule of wages has heretofore been thoroughly discussed with you, and at your request, after a telephone conversation, the wage rate which we sub-

mitted of $1.15 per hour for operating engineers, and a wage range of 80c to $1.00 per hour for maintenance men-trainees, was incorporated in the contract at your suggestion. We are not in a position to modify the wage schedule which we have submitted. We find this is in line, and somewhat higher in some respects, than the general wage rate for similar industries in this area, and we are informed, is higher than the wage rates provided in contracts which you now have with similar employers in this territory.

In view of the fact that the matters about which there is any substantial difference have been thoroughly discussed, we do not believe that there is any further need for discussion in person on these subjects. If you subsequently wish to revise your ideas on these issues, if you will submit them, they will be considered.

SPECIFICATION OF ERROR

The majority of the Court of Appeals erred:

1. In holding that the Petitioner's telegram of April 6 constituted a discharge of the striking employees and was a violation of Section 8(a)(1) of the Act.

2. In basing its decision on the assumption that the impasse which existed before the strike was broken by the strike.

3. In holding that the Trial Examiner in failing to assume that the impasse was broken by the strike erred as a matter of law.

4. In its finding and holding as follows:

> "That finally he (the Trial Examiner) erred as a matter of law in overlooking the fact that Section 8(d) imposed the duty to meet at reasonable times and that this obligation is not satisfied by the written communications upon which he relied."

5. In holding that the Petitioner violated Section 8(a)(5) of the Act by refusing to meet with the Union during the strike.

6. In failing to give the proper effect to Petitioner's letter of May 8 in which disclaiming any intention to discriminate against the strikers, the Company assured the Union that while it had secured replacements for some of the men, it could at the present time employ three, and, as far as the other employees were concerned, they could make application for reemployment and would be reemployed when vacancies occurred.

7. In holding that the suggestion of the Petitioner after sixteen sessions of oral negotiations had resulted in an impasse that written proposals be exchanged, was a refusal to bargain.

8. In ordering reinstatement of the striking employees with back pay, since no application was made for reinstatement.

9. In failing to give proper effect to the Trial Examiner's report and findings.

SUMMARY OF ARGUMENT

The majority of the Court misapplied the law in ignoring all of the negotiations before the strike and in assuming that the bargaining impasse was broken by the strike, since the findings of the Board must be based upon substantial evidence of the record considered as a whole.

The Petitioner's telegram of April 6 was nothing more than a statement of its right to do what the law permitted and was not a discharge of striking employees, particularly when considered in light of the Petitioner's letter of May 8 offering immediate reinstatement to three strikers and reinstatement of others as vacancies occurred.

The Petitioner having reinstated two strikers and having offered reinstatement to the others as vacancies occurred and having replaced the strikers who did not return to work and the others not having requested reinstatement during or after the strike, it was error for the Board and the majority of the Court to order their reinstatement with back pay.

ARGUMENT

I.

The Petitioner at all times bargained in good faith within the meaning of Section 8(a)(5) of the Act.

In order for the Board and the majority of the Court to find a refusal to bargain, they had to ignore and brush

aside all of the sixteen (16) meetings between the parties and the various forms of contracts submitted by the Petitioner to the Union, which contracts were thoroughly discussed before the strike, and assume that the impasse was broken by the strike.

In the first place, the Board and the majority were in error in basing their decision on an assumption. The Labor Management Relations Act expressly provides:

> 29 U.S.C. 160(c) "If upon the preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice. . . ."
>
> 29 U.S.C. 160(e). "The findings of the Board with respect to questions of fact if supported by substantial evidence of the record considered as a whole shall be conclusive."

This Court in *Universal Camera Corporation vs. National Labor Relations Board*, 340 U. S. 474, has laid down the rule with respect to the quantum of proof which constitutes substantial evidence of the record considered as a whole. Certainly, the Board and the majority of the Court in assuming that the bargaining impasse existing before the strike was broken by the strike fell short of the statutory requirements and the decision of this Court in the above case.

It is realized "whether on the record as a whole there is substantial evidence to support the Board's findings is a question which Congress has placed in the keeping of

the Courts of Appeals and that the Supreme Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corporation vs. N. L. R. B.*, 340 U. S. 490.

Since the decision herein was based on an assumption, this Court should intervene because the standard appears to have been misapprehended or grossly misapplied.

In the second place, the assumption was not authorized from evidence. The Petitioner submitted several contracts before the strike which were thoroughly discussed in person with the Union representatives, particularly the Petitioner's proposed contract of March 27. On May 20, during the strike, the Union submitted a contract which the Trial Examiner found "The contract submitted by the Union on May 20 and the Respondent's contract of March 27 are identical in form and language except that the Union's contract omits a clause giving the Respondent the right to discharge or discipline for intoxication, violation of safety rules and some other causes without further recourse to the grievance procedure by the affected employees; omits a clause in the Respondent's draft giving it the right to classify employees; does not follow the Respondent's proposed wage rate, work week or seniority provision.

It is therefore plain that the Union's proposal is merely a restatement of the parties' position, agreed upon, or

in dispute, at the close of the last meeting between them". (Record p. 119).

The majority of the Court held that the Trial Examiner erred as a matter of law in this respect and that he was not impressed that the Union did make substantial concessions on the matter of wages. The record does not support the majority's finding in this respect because it shows that the wage rate contained in the Union's proposal of May 20 had been discussed prior to the strike.

In support of its position "that the statutory obligation is not satisfied by merely inviting the Union to submit any proposition they may have in writing where either party seeks a personal conference", the majority of the Court cites *N. L. R. B. vs. Jacobs Manufacturing Company*, 196 F. 2d 680. In that case, there had been only two meetings over a short period of time before the Company requested the Union to submit its proposals in writing. Here there had been sixteen meetings over several months time. The Court also held in that case whether the Company had fulfilled its statutory duty to confer was a question of fact. Also, in *Jeffery-DeWitt Company vs. N. L. R. B.*, 91 F. 2d 134, the Court said:

> "Whether the refusal to negotiate further in this case was unreasonable under the circumstances of the case and on that account an unfair labor practice was a question of fact."

Despite these cases, the majority of the Court held that the Trial Examiner erred as a matter of law.

Even though the majority of the Court and the Board may have been of the opinion that the Union had made concessions after the strike, there is nothing in the record to show that the Petitioner was ready to make any concessions on the matter of wages, since in its letter of June 19, the Petitioner said "We are not in a position to modify the wage schedule which we have submitted. We find this in line and somewhat higher in some respects than the general wage rate for similar industries in this area, and we are informed, is higher than the wage rates provided in contracts which you now have with similar employers in this territory."

Is it reasonable to assume that when the strike was called, among other things, for increase in wages and the strike failed that the Petitioner would recede from its position on wages that it had taken before and during the strike, which position was legitimate as expressed in the Petitioner's letter above. In order for the Board and the majority to assume that the strike broke the impasse they would also have to assume that the Petitioner would have to make concessions. This is not required by the Act as stated by this Court in *N. L. R. B. vs. American National Insurance Company*, 343 U. S. 395, as follows: "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel

concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (See 29 U. S. C. 158(d)).

II.

The striking employees were not discharged prior to their replacement.

The Trial Examiner, the Board and the majority of the Court all found that the strike was economic in its inception. This being true, the Petitioner, without notice, had the right to replace striking employees. *N. L. R. B. vs. Mackay Radio & Telegraph Company*, 304 U. S. 333; *Textile Workers Union vs. Arista Mills Company*, 193 F. 2d 529; *Kansas Milling Company vs. N. L. R. B.*, 185 F. 2d 413; *N. L. R. B. vs. Bradley Washfountain Company*, 192 F. 2d 153-154.

The telegram of April 6 was nothing more than a warning to the strikers that if they did not return they would be replaced. The letter of April 24 regarding the group insurance is almost identical in terms with that of the Company in the Kansas Milling Company case. In that case, the Court said "This being an economic strike, the Company had the right to replace the strikers with other permanent employees. . . . The Company was not obliged to advise the strikers what it proposed to do. It could have quietly gone about hiring these replacements and then simply refused to reinstate strikers if they thereafter sought to return. How then can it be said that a warn-

ing of what the Company had a right to do without notice constituted an unfair labor practice?"

The Board and the majority did not give proper consideration to the facts existing at the time the telegram of April 6 and the letter of April 24 were sent. This Company at the time was engaged in the storage of perishable foods. It had 65 employees, only 7 of whom were involved in this controversy. The others continued to work and the plant was in operation. At the time the letter of April 24 was sent, four of the strikers had been replaced. On May 8, the Company offered to reinstate three strikers and to reemploy the others as vacancies occurred. If there was any vice in the telegram of April 6 and the letter of April 24, which is not admitted, it was cured by the Petitioner's letter of May 8. This letter stated the facts accurately and was in strict compliance with the law. The men had been given an unconditional offer to return and they refused to do so. Replacements had been hired for some of them and the Petitioner was willing to reinstate three at the time, two of whom did come back to work and have continued to work since that time.

If proper effect is given to the entire record and the Petitioner's letter of May 8, it cannot be fairly said that the Petitioner violated Section 8(a)(1) of the Act.

III.

It was error to order reinstatement of the striking employees with back pay, since there was no unconditional request for reinstatement.

It is without dispute in the record that on May 8 the Petitioner offered reinstatement to three of the strikers, two returned, and the remainder never applied for reemployment. The Courts and the Board have uniformly held that an employer is not required to reinstate and give back pay to striking employees in the absence of an unconditional offer to return to work. In the original complaint filed with the Board, it was contended that the Union's letter of May 1 was an offer by the striking employees to return to work. The Board found that this was not an unconditional request for reinstatement and "accordingly we shall dismiss so much of the complaint as alleges that the Respondent discriminated against the strikers in violation of Section 8(a)(3) of the Act by refusing to reinstate them upon request May 8 (May 1), 1950". (Record page 84). The Board also stated "We cannot construe the strikers' abandonment of the picket line, without more as tantamount to a desire to return to work (Record page 85).

The decision of the majority of the Court of Appeals and the order of the Board is contrary to the procedure established by the Board and the Courts in all prior cases.

In the case of *National Labor Relations Board vs. Crosby Chemicals, Inc.*, 188 F. 2d 91, Fifth Circuit, Judge Borah of the Fifth Circuit who wrote the opinion in the case at bar recognized this rule in stating:

> "Concluding, as we do, that there was no unconditional request for reinstatement by the striking Machinists, it follows that the contested portion of the Board's order requiring reinstatement of and payment of back pay to the fourteen Machinists and the posting of notices with respect thereto cannot be inforced."

CONCLUSION

The Petitioner here adopts as a part of this argument the intermediate report of the Trial Examiner (Record pp. 93-121) and the dissenting opinion of Chief Judge Hutcheson (Record pp. 132-136), which documents show a more comprehensive and discerning analysis of the evidence of the record considered as a whole and are much more a result of an impartial and judicial approach to the decision of the questions involved than that of the Board and the majority of the Court.

WHEREFORE, Petitioner prays that certiorari be granted; that the decision of the majority of the Court of

Appeals be reversed and that the petition for the enforcement of the Board's order be in all things denied.

Respectfully submitted,

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H. BASCOM THOMAS, JR.
COUNSEL FOR PETITIONER

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HUBARD T. BOWYER
OF COUNSEL

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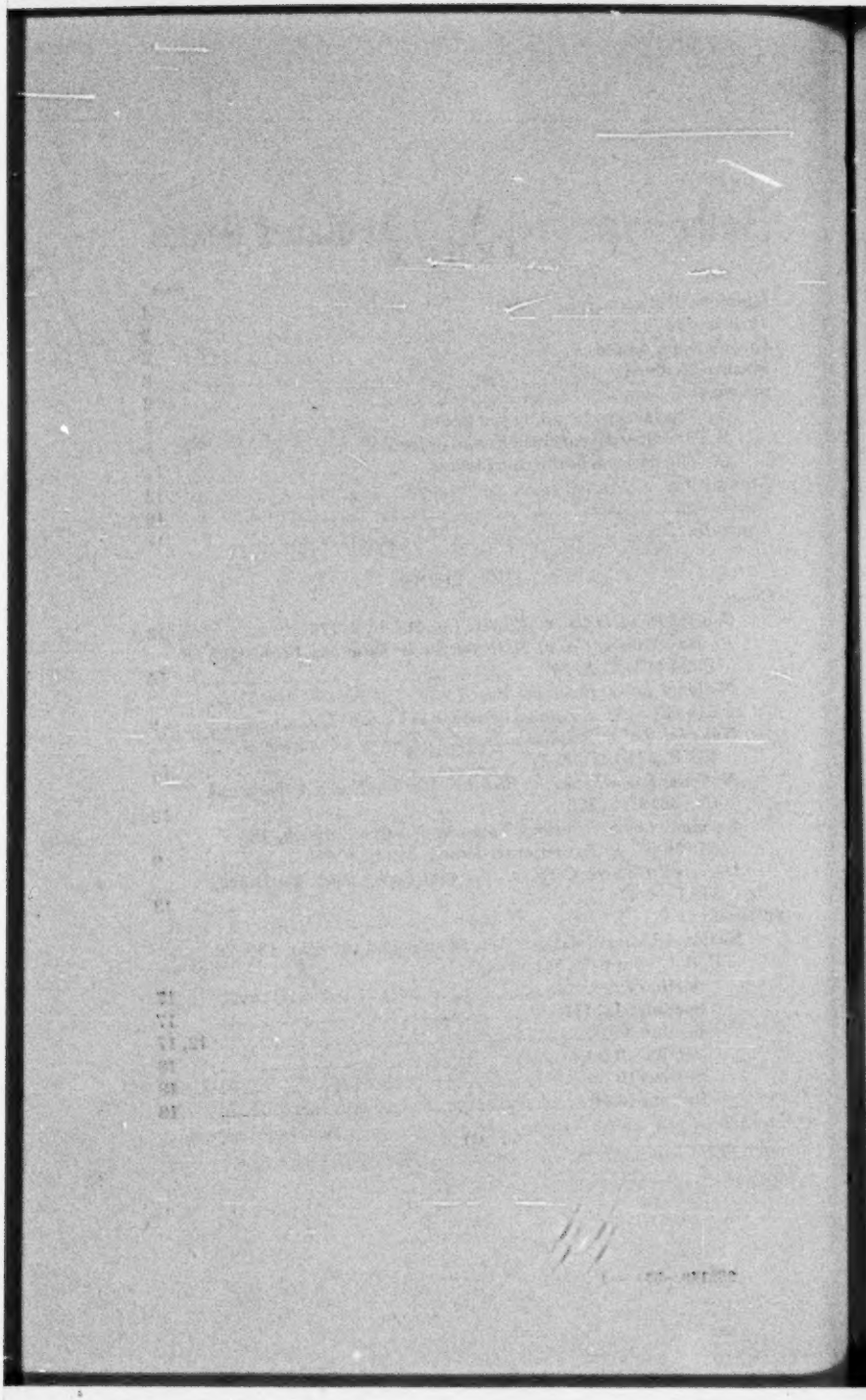

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 107

UNITED STATES COLD STORAGE CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 122–132)[1] is reported at 203 F. 2d 924. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 77–90) are reported at 96 NLRB 1108.

[1] The symbol "R." refers to the transcript of record; the symbol "B. A." refers to the appendix to the brief filed by the Board in the court below. Both of the foregoing, together with the appendix to the Company's brief in the court below, constitute the record before this Court.

JURISDICTION

The decree of the court below was entered on May 19, 1953 (R. 133–137). The petition for a writ of certiorari was filed on June 6, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Following an impasse in collective bargaining negotiations, a strike was called at petitioner's plant. After the strike had been in progress for three months, the representative of petitioner's employees submitted a proposed contract which contained a concession on one of the few major issues which had led to the impasse. The first question presented is whether, considering these circumstances, there is substantial evidence on the record as a whole to support the Board's finding that petitioner's refusal, because of the pre-strike impasse, to meet with its employees' representative to discuss the proposed contract violated Section 8 (a) (5) of the Act.

2. Whether substantial evidence on the record considered as a whole supports the Board's finding that petitioner discharged its striking employees because of their refusal to abandon a lawful strike and return to work, thereby violating Section 8 (a) (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 17–19.

STATEMENT

This case involves Board findings that petitioner committed unfair labor practices within the meaning of the Act (1) in discharging strikers because of their refusal to abandon a lawful strike and return to work; and (2) in refusing, during the course of a strike, to meet with the representative of its employees and bargain collectively concerning a new contract.

Petitioner challenges the propriety of these findings. The relevant facts may be summarized as follows:

A. The facts as found by the Board

On December 4, 1949, following an election held on November 10, 1949, the Board certified Stationary Engineers, Local 707, International Union of Operating Engineers, AFL, herein called the Union, as the exclusive bargaining representative of petitioner's employees in the engineering department of its Dallas, Texas, plant (R. 96, 97; B. A. 29–39).[2] During the next few months petitioner and the Union engaged in

[2] References preceding a semicolon are to Board findings; succeeding references are to the supporting evidence.

bargaining negotiations and reached agreement on all issues except wages and seniority (R. 97–111; B. A. 14–23, 27). These two matters being unresolved, the Union on April 5, 1950, called a strike of the engineering department employees and established a picket line at the plant (R. 112; B. A. 5, 6, 13).

On the second day of the strike, April 6, petitioner sent the following telegram to each of the seven striking employees (R. 112; B. A. 5–8, 39):

> We consider the strike illegal since at no time did the company refuse to bargain. Under the circumstances we would like you to report back to your regular job within 24 hours after receiving this telegram on your regular shift time. If you do not report, we will consider that you are terminating your employment and a replacement will be hired.

The strikers did not return to work, and petitioner, pursuant to the terms of the telegram, terminated their employment on April 7 (R. 81–83; B. A. 7–9, 11, 12).[3] Having thus discharged

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[3] R. P. MacKenzie, petitioner's vice president and manager, who sent the telegrams, testified as follows (R. 81, 82; B. A. 4, 8–9, 12):

"Q. * * * Then, are we to understand that at the termination of twenty-four hours after the receipt of the telegram by the seven employees, and if they did not report to work, their employment would be terminated as of that time?

"A. I consider that they would be terminating it; yes.

"Q. So we can say that their employment, then, was terminated approximately twenty-four hours after 6:30 p. m., April 6, 1950?

the strikers, petitioner thereafter began to hire new employees to fill the vacant jobs. The first such employee was hired on April 7, the second on April 11, and the third on April 12 (R. 114; B. A. 10, 11).[4]

On April 24, petitioner addressed a letter to each of the strikers which read in pertinent part as follows (R. 112, 113; B. A. 11, 12, 40, 41):

> On April 6, we notified you by telegram to return to work within 24 hours from the receipt of the message or *we would terminate the employment.* You did not return to work; and consequently *we consider you are no longer an employee of the Company.* [Emphasis supplied.][5]

"A. Correct.

"Trial Examiner Plost. Did you give these men any further notice after the telegram that their employment had been terminated by the company?

* * * * *

"The Witness. No, sir; we didn't. The telegram was worded, I thought that they would consider that they were terminating it if they didn't come back.

* * * * *

"Q. Now, Mr. MacKenzie, when the employees were discharged or their employment terminated by that telegram on April 6th, and their subsequent conduct, their employment was so terminated because of their refusal to work and abandon the strike they were on; is that not correct?

"A. I consider they terminated their own employment by not returning and running the plant for us."

[4] A fourth employee, Harnist, was hired on a purely temporary basis (B. A. 10, 23).

[5] In this letter petitioner gave each of the strikers an opportunity to convert the group insurance under which they had been covered to an individual policy (R. 112–113; B. A. 41).

On May 1, 1950, the Union wrote petitioner that it considered the termination of the employment of the strikers, as set forth in petitioner's telegram of April 6 and letter of April 24, to constitute discrimination within the meaning of Section 8 (a) (3) of the Act, and that it had filed an unfair labor practice charge with the Board alleging such unlawful discrimination (R. 83; B. A. 51, 52). In response to this letter, petitioner wrote to the Union, protesting that there had been no discrimination against the strikers and that they had not been discharged but had voluntarily terminated their employment (R. 82, 83; B. A. 53–55). Petitioner further stated that while it had secured replacements for some of the strikers, it could reemploy one operating engineer and two maintenance men, and that as far as "the other former employees" were concerned, they might make application for employment and would be reemployed when vacancies occurred (R. 8; B. A. 54, 55). On May 13, 1950, two of the strikers, William Driver and Claude Barksdale, applied for the available jobs and were reemployed (B. A. 5, 10). The others remained on strike and did not apply for reemployment.

While these events were taking place, the Union sought to resume bargaining negotiations. Approximately a month after the strike began, the Union wrote petitioner that "we stand ready to meet and bargain with you in good faith at any time" (R. 78, 79; B. A. 52). In its May 8

reply, petitioner stated that "If you desire to continue negotiations, if you will submit any proposition you have to make in writing, it will be considered by the Company at any time" (R. 82; B. A. 55). Accordingly, on May 20, 1950, the Union submitted a proposed contract and asked petitioner to meet with it for the purpose of negotiations (R. 78, n. 1; B. A. 55–62).

In this proposed contract, the Union made a substantial concession on the issue of wages, which had been a major stumbling block in the bargaining negotiations prior to the strike.* Nevertheless, petitioner again ignored the Union's request for a resumption of negotiations and, on June 1, 1950, wrote the Union that certain provisions of the proposed contract were unacceptable and that, if the Union would revise its contract in accordance with petitioner's views and resubmit it, petitioner would consider it (R. 78; B. A. 64–65).

Replying to this letter, the Union on June 2 again asked petitioner to meet personally with it for the purpose of negotiating a satisfactory agreement (R. 78, n. 1; B. A. 66). On June 19,

* During the pre-strike negotiations the Union had been asking for $1.50 per hour for operating engineers and $1.45 per hour for maintenance men trainees, while the best offer made by petitioner had been $1.15 for engineers and 80 cents to $1.00 for trainees (R. 102, 104; B. A. 20, 21, 24, 25, 27, 42–46). In the proposed contract of May 20, the Union reduced its demand to $1.35 for engineers and $1.05 to $1.25 for trainees (R. 102; B. A. 55–59).

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petitioner specifically refused to meet with the Union on the ground that in its opinion further negotiations would be futile since pre-strike efforts to bargain had resulted in an impasse on seniority and wages (R. 78–79; B. A. 67–68). Petitioner repeated its suggestion that the Union revise its proposed contract in accordance with petitioner's views and resubmit it for consideration (R. 79; B. A. 68). On June 20, the Union, for the fourth time since the beginning of the strike, asked for a bargaining conference, but petitioner this time ignored the request altogether (R. 78, n. 1, 79; B. A. 68, 69).

B. The Board's conclusions and order

Upon the foregoing facts the Board found, contrary to the Trial Examiner, that petitioner had violated Section 8 (a) (5) and (1) of the Act. While agreeing with the Trial Examiner that the bargaining obligation does not require parties to engage in futile bargaining in the face of a genuine impasse, the Board was of the view, under all the circumstances in the record, that the changed situation created by the strike broke the impasse, and that petitioner did not fulfill the bargaining obligation defined in Section 8 (d) of the Act "to meet at reasonable times and confer" with the Union (R. 78–79).

The Board also found that petitioner had discharged its employees for striking and thereby vio-

lated Section 8 (a) (1) of the Act.[7] In so holding, the Board reaffirmed the right of an employer to replace economic strikers, thereby terminating their employment. However, contrary to the Trial Examiner, the Board concluded that petitioner's April 6 telegram was not a mere statement of its right to replace strikers, but rather a notice of discharge, such discharge taking effect pursuant to the terms of the telegram, 24 hours after its receipt and before any of the strikers had been replaced (R. 79–83). The Board predicated this holding on all the facts in the record, including the interpretation placed on the April 6 telegram by petitioner's own officials (R. 81–83; n. 3, *supra*, pp. 4–5).

Accordingly, the Board ordered petitioner to cease and desist from its unfair labor practices, to bargain with the Union upon request, to reinstate and make whole the employees discriminated against, and to post the usual notices (R. 87–90).[8]

[7] The Board, recognizing that such conduct also violated Section 8 (a) (3) of the Act, refrained from so finding in the absence of a specific allegation to that effect in the complaint. The remedy of reinstatement and back pay is appropriate, however, on either theory. *National Labor Relations Board* v. *J. I. Case Co.*, 198 F. 2d 919, 924 (C. A. 8), certiorari denied, 345 U. S. 917; *National Labor Relations Board* v. *Nu-Car Carriers*, 189 F. 2d 756, 760 (C. A. 3), certiorari denied, 342 U. S. 919.

[8] The Board's order limits back pay to reimbursement for wage losses sustained by the discharged employees only "by reason of [petitioner's] discrimination against them" (R. 3). Accordingly, pursuant to the Board's customary practice in strike situations, petitioner will be required to make the

C. The decision of the court below

The court below, Chief Judge Hutcheson dissenting, approved the Board's findings and enforced the Board's order (R. 122–132). Analyzing the relevant evidence, the majority agreed with the Board that petitioner's April 6 telegram "did not constitute a mere statement of [petitioner's] right to replace economic strikers, but actually operated as a notice of discharge to be effective 24 hours after its receipt if they had not by then reported back to their regular jobs" (R. 126). Recognizing, as had the Board, petitioner's right to replace economic strikers and thereby terminate their employment, the majority noted the countervailing and uniform rule that discharge of such strikers prior to the time their jobs are filled, in reprisal for striking, constitutes an unfair labor practice (R. 126–127).

On the bargaining issue, the majority was in accord with the Board's view that, upon all the facts in the record, petitioner could not be deemed to have fulfilled its bargaining obligation (R. 127–129). Alluding specifically to the duty to bargain as defined in Section 8 (d) of the Act,

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employees whole not from the date of the discharges but only "from the date when they have indicated their desire to return to work * * * by abandoning the strike or otherwise" (R. 85). Similarly, in view of the Trial Examiner's prior dismissal of the portions of the complaint alleging discrimination, the Board's back pay order excludes liability for the period between the issuance of the Intermediate Report and its own Decision and Order (R. 86).

to the impact of a strike of almost three months' duration upon the willingness of the parties to compromise their differences, and to the fact that the Union's proposed contract of May 20 contained a substantial concession on the critical issue of wages, the majority concluded, like the Board, that the impasse which might otherwise have rendered any further bargaining futile was effectively broken so as to reactivate petitioner's obligation "to meet at reasonable times and confer in good faith" (R. 128–129). Accordingly, the majority ruled that petitioner's refusal to meet with the Union and negotiate further "was unreasonable under the changed circumstances then existing" and constituted a violation of Section 8 (a) (5) of the Act (R. 129).

The dissenting judge adopted the view espoused by petitioner and the Trial Examiner that the April 6 telegram constituted a mere restatement of petitioner's right to replace economic strikers, and that petitioner's refusal during the strike to meet and confer with the Union concerning its proposed contract of May 20 was proper in view of the prior impasse in bargaining negotiations and the surrounding circumstances (R. 129–131). The dissenting opinion also argued that petitioner's offer of May 8 to reinstate three strikers immediately and reemploy the rest when vacancies occurred, coupled with the failure of most of the strikers to request reinstatement, satisfied any

obligation of petitioner under the Act, and hence invalidated the Board's order (R. 131–132).

ARGUMENT

Petitioner asserts no appropriate basis for the grant of certiorari. The principles of law involved are well settled and undisputed here. The case involves only differences as to the proper factual inferences to be drawn from the record—differences which, in our view, were correctly resolved by the Board and the majority of the court below, but which present, in any event, no occasion for further review by this Court.

1. On the issue as to whether petitioner unlawfully refused to bargain collectively, the parties are agreed that where a genuine impasse exists, the Act does not require a continuation of futile bargaining negotiations. On the other hand, it is equally unchallenged that where circumstances demonstrate that the impasse no longer exists, the bargaining obligation defined by Section 8 (d) of the Act is again fully operative. The difference between the majority and the minority views in the court below, like the difference between the Board and the Trial Examiner, rests merely in the inferences drawn from the virtually undisputed facts. In their appraisal of the record, the court majority and the Board concluded, from the three-month-old strike and from the fact that the Union in its May 20 contract made a concession on one of the two major issues

previously dividing petitioner and the Union, that the conditions which had led to the impasse had changed, that the deadlock had been broken, and that petitioner was therefore under a duty again to meet with the Union and bargain (R. 78–79, 127–129). The dissenting judge (R. 131), like petitioner (Pet. 18–23), felt that this inference was unwarranted. At most, therefore, the sole matter in issue is whether the facts on the record support the Board's view, concurred in by the court majority. We submit that they do. And "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; see also *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 491.*

2. The question concerning the discharge of the strikers is likewise not appropriate for review. The basic postulates laid down by *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, that an employer may in order to continue his business replace economic strikers,

* There is no substance in petitioner's contention (Pet. 9, 11, 16, 18, 19, 20) that because the majority in the court below used the word "assumption" in describing the Board's holding that the impasse was broken (R. 131), that holding is therefore vulnerable as unsupported by the record. The court below used the word "assumption" in the sense of "finding," as is clear from the context of the opinion, and concluded that the finding in question was adequately supported by the record.

but that he may not discharge employees in reprisal for striking are acknowledged on both sides. The dissenting judge merely quarrels with the finding of the Board, approved by the majority of the court below, that the telegram of April 6 constituted a notice of discharge rather than a mere restatement of the law governing replacement of economic strikers. In view of the construction placed upon the telegram by its author, petitioner's vice-president and manager (*supra,* n. 3), plus petitioner's later allusion to the telegram in its letter of April 24 as resulting in a termination of employment (*supra,* p. 5), the finding that the telegram was a notice of discharge, taking effect 24 hours after its receipt, is plainly reasonable.

Kansas Milling Company v. *National Labor Relations Board,* 185 F. 2d 413 (C. A. 10), on which petitioner relies, is not in conflict with the instant case. While the language contained in the "back-to-work" letters involved there had a surface similarity to the words used here, there was in that case no showing, as there was here, that the language was intended to, and did, amount to a notice of discharge. Here, again, petitioner disputes nothing more than the correctness of a particular fact finding or inference reached by the Board and approved by the majority of the court below on the record considered as a whole.

3. Petitioner's question numbered (3) (Pet. 10, 25–26), relating to the propriety of a Board order directing reinstatement and back pay to strikers who have not requested reinstatement, is not presented. Inasmuch as the Board determined that the strikers in the instant case had been discharged, the question is not as to the reinstatement of strikers but as to the reinstatement of wrongfully discharged employees who are not required to make the futile gesture of applying for reinstatement.[10] *National Labor Relations Board* v. *Crosby Chemicals, Inc.*, 188 F. 2d 91 (C. A. 5), upon which the dissenting judge (R. 136, n. 2) and petitioner (Pet. 26) rely, has to do with the former situation. It should, perhaps, be noted that the Board here, as in all strike situations, carefully limited the relief granted to the period when it was clear that the strike had been abandoned or otherwise terminated (see *supra*, n. 8, pp. 9–10). But when this condition was met, the employees' right to reinstatement and back pay was complete without the formality of a demand that the employer remedy the unlawful discharges.

[10] By the same token, petitioner's offer of May 8, 1950, a month after the wrongful discharges, to reemploy three of the strikers, and the actual reemployment on May 13 of two of the strikers (*supra*, p. 6), in no way terminated its liability with regard to them. For these steps fall short, of course, of what wrongfully discharged employees are entitled to under the Act—namely, substantially equivalent positions without prejudice to their seniority or other rights and privileges.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question calling for review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

OSCAR H. DAVIS,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

ARNOLD ORDMAN,
Attorney,

National Labor Relations Board.

JULY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the

proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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